SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1341

MICHAEL LOUIS BEHR, COURTENAY LUCILE NORTH and PAULINE MARIE STEVENS,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

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IN THE

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No. .....

MICHAEL LOUIS BEHR, COURTENAY LUCILE NORTH and PAULINE MARIE STEVENS,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

Petitioners, Michael Louis Behr, Courtenay Lucile North, and Pauline Marie Stevens do respectfully pray for a Writ of Certiorari to issue to the Appellate Department of the Superior Court of the State of California, County of Los Angeles, to review its judgment affirming the judgment of conviction of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, by which petitioners were sentenced as follows:

> "a. Michael Louis Behr:—Six months county jail, suspended, one year summary probation, on the condition that he pay a fine of $400.00 plus Penalty Assessment.
>
> b. Courtenay Lucile North:—Six months county jail, suspended, one year summary proba-

tion, on the condition that she pay a fine of $200.00 plus Penalty Assessment, and that she not engage in any kind of nude entertainment.

c. Pauline Marie Stevens:—Six months county jail, suspended, one year summary probation, on the condition that she pay a fine of $200.00 plus Penalty Assessment, and that she not engage in any kind of nude entertainment."

Opinions Below.

Trial was had in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, and was by a court sitting without a jury.

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment of conviction without opinion.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The date of the judgment of the Appellate Department of the Los Angeles County Superior Court sought to be reviewed is January 18, 1972. The time of entry of said judgment is January 18, 1972.

Under the law of the State of California, a convicted defendant charged with a misdemeanor in the Municipal Court of the State of California may appeal to the Appellate Department of the Superior Court, as a matter of right. California Penal Code §1466.

No further appeal is permitted under California law, as a matter of right. The Appellate Department of the Superior Court of the State of California was the highest court of the state in which a decision could be had as a matter of right. *Edwards v. People*, 314 U.S.

160, 171, 62 S. Ct. 164, 165; 86 L. Ed. 119; *Smith v. People,* 361 U.S. 147, 148, fn. 2, 80 S. Ct. 215, 216, fn. 2; *Alberts v. California,* 354 U.S. 476, 481, fn. 6, 77 S. Ct. 1304, 1307, fn. 6.

The statutory provision which confers jurisdiction upon this court to review the judgment in question by Writ of Certiorari is 28 U.S.C.A. §1257 (3).

Questions Presented for Review.

1. Is the live conduct which was the subject and gravamen upon which petitioners were convicted legally obscene or is it entitled to the protection of the First Amendment of the United States Constitution?

Corollary to this question is whether any performance which falls short of and is not a candid, graphic portrayal of sexual intercourse or sexual perversion capable of being denominated and found legally obscene?

2. Whether California Penal Code Section 311.6 and Section 311(a) are void for vagueness because they impart no notice whatever as to what specific conduct may be found to be obscene?

3. Whether or not California Penal Code Section 311.6 is void as violating the equal protections clause of the United States Constitution in that the State of California obscenity statute in Section 311.2(b) exempts projectionists of obscene motion pictures who have no financial interest in the establishment other than wages.

Constitutional Provisions and Statutes Involved.

Involved herein are the First and Fourteenth Amendments of the United States Constitution; Sections 311(a), 311(g), 311.2 and 311.6 of the California Penal Code; California Penal Code Section 1466.

Statement of the Case.

Petitioners were charged in a Municipal Court complaint with an obscene live performance. Petitioners North and Stevens were charged with the actual performance and petitioner Behr was charged with managing and allowing that performance. A jury was waived in the case and a trial was had in the Municipal Court, No. 393743, on August 24, 1971, before the Honorable Bonnie Lee Martin, Judge presiding. On August 25, 1971, the trial concluded and the court found the defendants guilty as charged.

Petitioners were sentenced at the time as indicated, *supra*. Thereafter, timely notice of appeal was filed and an appeal was taken pursuant to California law as above described, to the Appellate Department of the Superior Court of the County of Los Angeles, State of California. The appeal to the Appellate Department of the Superior Court of the County of Los Angeles was determined adversely to the petitioners.

The Appellate Department of the Superior Court for the County of Los Angeles is the court of last resort as a matter of right to a person convicted of a misdemeanor in the Municipal Court.

The Federal Constitutional questions set forth above were first raised in the trial court by petitioners' plea of not guilty. The definition of obscenity contained in the California Penal Code Section 311(a) (g), and the definition of obscenity enunciated in *Roth v. United States*, 354 U.S. 486, 77 S. Ct. 1304 are exactly the same. By reason of petitioners' conviction, it was implicit in the judgment that the performance charged in said case was obscene, not only under California law

but under the definition of obscenity contained in *Roth v. United States, supra,* said performance was thereby declared to be unprotected by the First Amendment of the United States Constitution.

The obscenity *vel non* of the performance involved under question number 1 was raised at all appropriate stages during the trial and on appeal to the Appellate Department of the Superior Court for the County of Los Angeles.

Description of Performance Involved.

Petitioners North and Stevens performed in a manner which was substantially the same, to wit, they got on a stage in a bar while music was playing from the juke box. They were entirely nude and gyrated and contorted their bodies in a position which exposed their vaginas to the audience which was in relatively close proximity to the stage. During the performance of petitioners North and Stevens their bodies were contorted in such a manner as to make their vaginas completely exposed and in a somewhat open condition. During the performance, and at no time, did petitioners North and Stevens and/or Stevens touch their vaginas, nor did they insert any foreign objects into their vaginas. Simply stated, while the jukebox was playing they danced and performed and gyrated in a manner exposing their private parts to the audience with their bodies undulating.

None of the performances of North and Stevens which were the subject of the within cases contained the kind of action which is normally considered to be hard-core pornography. Rather, all of the performances above-described fall far short of that description.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Certiorari Should Be Granted Because It Is the Announced Duty of this Honorable Court to Review All Decisions Wherein the Substantial Question of Free Expression Under the First Amendment of the United States Constitution Is Presented.

Petitioners rely on this Court's announced position with regard to the singular importance of ceaseless vigilance to safeguard and uphold the constitutional guarantee of free expression under the First Amendment of the United States Constitution, *Roth v. United States*, 354 U.S. 476, 488, 77 S. Ct. 1304, 1311.

As this Court stated in *Jacobellis v. Ohio*, 378 U.S. 184, 188, 84 S. Ct. 1676, 1678:

> "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States*, supra, 354 U.S., at 479-498, ... S. Ct., at 1315-1316 (separate opinion). Such an issue, we think, must ultimately be decided by this court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id. 354 U.S., at 498, 77 S. Ct., at 1316, see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 1437, 8 L.Ed. 2d 639 (opinion of Harland, J.)"

And at page 1679, the Court stated:

> "Hence we reaffirm the principle that, in obscenity cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

This Court has held that expression in the form of motion picture films is also within the ambit of the First Amendment guarantees of free expression, *Jacobellis v. State of Ohio, supra.*

Petitioners most respectfully contend that these paramount and precious rights so derived should never be left with a local court their final arbiter. These First Amendment rights demand a constitutional judgment of the most sensitive type which must, when required, always be finally adjudicated by the United States Supreme Court.

II.

The Conduct Involved in the Within Case Is Constitutionally Protected by the First Amendment of the United States Constitution.

Since the landmark decision in *Roth v. United States, supra,* 354 U.S. 476 (1957), myriad decisions have been rendered by various courts interpreting the doctrine contained therein.

Inasmuch as this petition cannot be exhaustive, on all of the cases referred to, suffice it to say that all of the myraid decisions culminated in a short *per curiam* decision of this Honorable Court in *Redrup v. State*

of New York, 87 S. Ct. 1414, 386 U.S. 770 (1967). In the *Redrup* case, *supra*, the Court summarized the positions of each of the individual supreme court justices and, *inter alia*, stated that obscenity consisted of the following:

> ". . . a state may not constitutionally inhibit the distribution of literary material as obscene unless (a) the dominant theme of the materials taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, emphasizing that the 'three elements must coalesce', and that no such material can be 'proscribed unless it is found to be utterly without redeeming social value.'"

At page 1415, the Court stated clearly and differentiated other cases it was deciding by stating that there were certain elements in the cases that were entirely lacking which to their minds might have changed the results. These elements were stated as follows:

> ". . . in none of the cases was there a claim that the statute in question reflected a specific or limited state concern for juveniles . . . in none was there any suggestion of an assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it . . . and in none was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31."

It was generally conceded and understood following the *Redrup* decision, *supra*, that the United States Supreme Court had stated clearly that only "hard core" pronography could be constitutionally proscribed, unless the three other elements stated above were present, which elements were stated as above quoted at page 1415, being (1) a concern for juveniles, (2) an invasion of individual privacy of unwilling adults and (3) pandering.

The Court then confirmed this position historically by granting certiorari and reversing summarily in a number of cases. This petition cannot exhaustively cite all of the numerous cases reversed summarily, but some of said cases are as follows:

Schackman v. California (1967) 388 U.S. 454; *Central Magazine Sales v. U.S.*, (1967) 389 U.S. 50; *Friedman v. New York*, (1967) 388 U.S. 441.

That this was the general understanding of the legal community is made clear by a quotation from the case of *Luros v. United States*, (1968, 8 CCA) 389 F. 2d 200, wherein that Court states as follows at page 205:

> "In *Redrup v. State of New York*, 386 U.S. 767, there is specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' pornography. Subsequent application of Redrup gives no contra-indication."

Similarly, the California Supreme Court in the case of *People v. Noroff*, 63 Cal. Rptr. 575, 433 P. 2d 479 (1967) states as follows at page 481:

> "The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court

has ever ruled obscene. The publications involved in *Ginzburg v. United States*, 383 U.S. 462, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of 'animating sensual detail to give the publication a salacious cast . . . the film central to the litigation in *Landau v. Fording*, 383 U.S. 456, 'explicitly and vividly revealed acts of masturbation, oral copulations, . . . sadism, masochism and sex . . . Such materials, and no others, have been thought to constitute 'hard-core' pornography. (See the dissenting opinion of Steward, J., in *Ginsburg v. U.S.*, supra; see also Magrath, the *Obscenity Cases: Graphes of Roth, the 1966 Supreme Court Review 7*, at 71."

Petitioners most respectfully urge that the First Amendment of the United States Constitution, if it will tolerate any proscriptions at all, will tolerate only the proscription of "hard-core" pornography.

Inasmuch as the conduct involved in the within case falls short of hard-core pornography, petitioners most respectfully pray that this court grant their Writ and render its independent final constitutional determination thereon.

III.

The Performances Involved by Appellants North and Stevens Were Not Obscene and Were Constitutionally Protected.

It is important at the outset to note that the prosecution in the instant case chose as the theory of their case and the basis of their complaint obscenity, in filing the matter pursuant to Penal Code Section 311.6. The

People did not see fit to invoke or claim the violation of Penal Code Section 314 or Penal Code Section 647 (a) having to do with lewd and indecent exhibitions.

Since the People chose an obscenity section upon which to base their prosecution, they are then held to the burden of proving that the live performance was in fact obscene as defined by the law and cases thereunder; since if the performance, under the law, is constitutionally protected and not obscene then the conduct engaged in by the appellants North and Stevens, even though a possible violation of 314 or 647 (a) may exist, they would still not be guilty of the offense charged.

Before a thing can be obscene, certain elements must be met, and these elements are enunciated in Section 311 of the Penal Code, particularly 311 (a) defining obscene matter and 311 (g) defining obscene live conduct. These elements, among other things, are that the dominant appeal of the conduct to the average person applying contemporary standards is to prurient interest, that is a shameful or morbid interest in nudity, sex or excretion, and which conduct, when taken as a whole, goes substantially beyond the customary limits of candor and description and representation of such matters, and is conduct, which taken as a whole, is utterly without redeeming social importance. All of the elements must dovetail before the performance can be adjudged obscene. It is interesting to note that the same elements are required in judging a motion picture, a play, a book or magazine, or a painting.

The Constitutional standards and criteria for judging obscenity first enunciated in *Roth v. United States*, 354 U.S. 476, have undergone a process of refine-

ment and reformulation by the United States Supreme Court in the last decade, culminating in the series of decisions rendered by the Supreme Court on May 8 and June 12, 1967. Generally, it may be stated as a conclusion to be drawn from the development of the constitutional standards by the Supreme Court that the area for the suppression of books, magazines and other media of communication is extremely narrow and limited, and that the constitutional protection for writings under the free speech and press provisions of the First and Fourteenth Amendments is extremely broad. See, *Times Film Corp. v. Chicago*, 355 U.S. 35, reversing 244 F. 2d 432 (7 Cir. 1957); *One, Inc. v. Olesen*, 355 U.S. 371, reversing 241 F. 2d 779 (9 Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, reversing 249 F. 2d 114 (D.C. Cir. 1957); *Mounce v. United States*, 355 U.S. 180 reversing 247 F. 2d 149 (9 Cir. 1957); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, reversing 4 N.Y. 2d 349, 151 N.E. 2d 197, 175 N.Y.S. 2d 39 (1958); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, reversing 289 F. 2d 455 (D.C. Cir. 1961); *Jacobellis v. Ohio*, 378 U.S. 184, reversing 173 Ohio St. 22, 179 N.E. 2d 777 (1962).

In these initial series of decisions following *Roth*, the Supreme Court made clear that the standards for judging constitutional protection for writings are not to be measured by the appeal of the writings to children. *Butler v. Michigan*, 352 U.S. 380. The test is the effect of the material upon the average normal adult. The Supreme Court decisions indicate that sex and obscenity are not synonymous; that obscenity is not a matter of taste, nor of good or bad literature, nor good or bad art; that the constitutional protection exists for

books and other material which is entertaining as much as it exists for material which is informing. Books may not be suppressed because they are deemed sacrilegious or immoral or harmful or non-educational or non-amusing. *Jos. Burstyn, Inc. v. Wilson,* 343 U.S. 495; *Gelling v. Texas,* 343 U.S. 960; *Superior Films Inc. v. Dept. of Ed.,* 346 U.S. 587; *Holmby Productions Inc. v. Vaughn,* 350 U.S. 870. The Constitution protects expression without regard "to the truth, popularity or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button,* 371 U.S. 415, 445.

The decision of the United States Supreme Court in *Jacobellis v. Ohio,* 378 U.S. 184, rendered in 1964, emphasized the critical elements essential to justify a charge of obscenity in the light of the constitutional guarantees. The Supreme Court held that the Standards for judging obscenity required, in the first instance, a finding that the material goes substantially beyond customary limits of candor, in the Nation as a whole, in description or representation of sex or nudity. In addition, the Supreme Court held that a book or magazine, or other media of communication, could not be deemed obscene if the dominant theme of the material taken as a whole did not appeal to a prurient interest, that is, to a shameful or morbid interest in nudity or sex. In addition to the elements of contemporary community standards and prurient interest, it was also necessary to establish that the book or magazine involved in the prosecution was *utterly* without redeeming social importance. Moreover, and finally, the constitutional protection to which a book or magazine is entitled could not be made to turn on a "weighing" of its social importance against its prurient appeal (378 U.S. at 191-195).

It was on the basis of the aforesaid standards enunciated in *Jacobellis* that the books "Tropic of Cancer" and "Pleasure was my Business" were held at the same time by the United States Supreme Court to be entitled to constitutional protection. *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Tralins v. Gerstein*, 378 U.S. 576.

In 1966, the United States Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413, involving the book "Fanny Hill", emphasized the fact that all of the elements for judging obscenity are not only independent, but must coalesce and be established before there can be a finding of obscenity. (383 U.S. at 418-419).

On May 8, 1967, the Supreme Court decided three cases in a single *per curiam* opinion. *Redrup v. New York [Austin v. Kentucky and Gent v. Arkansas]*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515. In each of the cases, the Supreme Court concluded that the distribution of the material therein involved was "protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem" (87 S. Ct. at 1417).

The *per curiam* opinion points out that two members of the Court have consistently maintained the view that obscenity laws are inconsistent with the provisions of the First Amendment. As is well known, these are the views of Justices Douglas and Black.

The *per curiam* opinion then points out that a third member of the Court has always held to the opinion that a State's power in the obscenity area is limited "to a distinct and clearly identifiable class of material" (87 S. Ct. at 1416). This has been the opinion of

Justice Stewart. In the view of Justice Stewart, expressed in *Jacobellis v. Ohio* (378 U.S. at 197); *Quantity of Copies of Books v. Kansas* (378 U.S. 205, 213); and *Ginzburg v. United States* (383 U.S. 463, 499, n. 3) all books and other writings are entitled to First Amendment protection, except those which fall in the narrow class designated as "hard core pornography". Justice Stewart defined "hard core pornography" in *Ginzburg* as follows:

> ": . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . ." (383 U.S. at 499, n. 3).

So far as the federal jurisdiction is concerned, the views of Justice Stewart are also the views of Justice Harlan. See, *Memoirs v. Massachusetts*, 383 U.S. at 455-460.

The *per curiam* opinion *Redrup* then observes that other members of the Court have subscribed to a "not dissimilar standard" (87 S. Ct. at 1416), pointing out that only a single Justice has declined to view the "social value" element as an independent factor in the

judgment of obscenity. This has been the view of Justice White.

The *per curiam* opinion in *Redrup* therefore, makes it clear that at least six members of the Supreme Court have adopted the view that only "hard core pornography" may be proscribed.

The aforesaid constitutional implications of the *Redrup* decision were made explicit in the series of decisions rendered on June 12, 1967. All of the reversals of the judgments of conviction rendered in the state and federal courts, as well as civil and *in rem* judgments were by *curiam* opinions based upon the decision in *Redrup v. New York* or *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, the latter decision involving nudist magazines to which appellants refer hereafter.

Another recent case which states the rule that only "hard-core pornography" is proscribable is the case of *Luros v. United States of America*, wherein the United States Court of Appeals for the Eighth Circuit stated as follows:

> "In *Redrup v. New York*, 386 U.S. 767 (1967), there is specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' pornography. Subsequent application of Redrup gives no contra indication."

And this Court in its decision of October 23, 1967, in the case of *Culbertson v. State of California*, 385 F. 2d 209, agreed with and stated the "hard-core" pornography rule where it stated at page 210:

> ". . . the pictures are not artistic, but we are thoroughly convinced that they are not 'hard-core pornography,' and that they do not in their expression, go 'substantially beyond customary limits of candor'. See Redrup v. State of New York . . ."

In the case of *People v. Noroff*, 433 P. 2d 479, 63 Cal. Rptr. 575 (1967), the Supreme Court of California comes to a like conclusion when it states at page 481:

> "The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials whch the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg v. United States*, 383 U.S. 462, contained descriptions and photographic essays, dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of 'animating sensual detail to give the publication a salacious cast the film central to the litigation in *Landau vs. Fording*, 388 U.S. 456 explicitly and vividly revealed acts of masturbation, oral copulation, . . . sadism, masochism and sex . . . Such materials and no others, have been thought to constitute 'hard-core' pornography."

In addition to the foregoing, a most recent case decided by this Court is *Pinkus v. Pitchess, et al.* (June 29, 1970), 429 F. 2d 416, held motion pictures of a masturbating female to be not obscene. This case is also important for the proposition that the prosecution must introduce persuasive evidence that the materials are offensive to contemporary notions of free expression.

Following is a list of some of the major decisions which have been rendered since *Roth, supra.*

In 1957, in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, the first case to be decided with regard to nudist materials following the *Roth* decision, the United States Supreme Court simply reversed a lower court decision which had held that the magazine "Sunshine

and Health" was obscene. The Supreme Court was a "per curiam" opinion which then cited only *Roth v. United States*, 354 U.S. 476.

In *Mounce v. United States*, 355 U.S. 180, the United States Supreme Court reversed a Washington, D.C. District Court decision holding that magazines entitled "Model Study", "International Journal" and "Helios" were obscene. The magazines contained photographs of nude human beings including full depictions of pubic areas.

In *One, Inc. v. Oleson*, 355 U.S. 371, 78 S. Ct. 364, the Supreme Court of the United States reversed a Ninth Circuit Court of Appeals decision, 241 F. 2d 772, with regard to a magazine entitled "One". The title of the magazine included the descriptive words "for homosexuals". The Supreme Court reversed *per curiam*.

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, the Supreme Court of the United States reversed a circuit court decision of the District of Columbia (289 F. 2d 455), with regard to magazines which contained nude and nearly nude photographs of male models, which magazines were according to the circuit court's opinion "primary symbols of sexual fantasies of deviants within the homosexual group".

On May 8, 1967, the United States Supreme Court in *Austin v. Kentucky*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 515, reversed a judgment of conviction in an obscenity prosecution and found the following magazines to be entitled to constitutional protection: "Spree", #38, and "High Heels, Vol. 2, #6."

On May 8, 1967, the United States Supreme Court in *Gent v. Arkansas*, 386 U.S. 767, 87 S. Ct. 1414, 18

L. Ed. 2d 515, reversed a judgment *in rem* in an obscenity action, and found the following magazines to be entitled to constitutional protection: "Gent", "Swank", "Bachelor", "Cavalcade", "Gentleman", "Ace" and "sir".

On June 12, 1967, the United States Supreme Court in *Rosenbloom v. Virginia,* ..... U.S. ....., 87 S. Ct. 2095, reversed a judgment of conviction in an obscenity prosecution and, based on its decision in *Sunshine Book Co., supra,* decided that nudist magazines were entitled to constitutional protection. Involved in the case was the nudist magazine "Solis", and 107 other nudist magazines.

On June 12, 1967, the United States Supreme Court in *Avansino v. New York,* 388 U.S. 446, 87 S. Ct. 2093, reversed a judgment of conviction in an obscenity prosecution and, based on its decision in Redrup, found that certain packets of photographs and a publication therein involved were entitled to constitutional protection.

On June 12, 1967, the United States Supreme Court in *Ratner v. California,* 388 U.S. 442, 87 S. Ct. 2090, reversed a judgment of conviction in an obscenity prosecution and, based on its decision in *Redrup,* found that the motion picture film "Honey Bee" therein involved was entitled to constitutional protection.

On June 12, 1967, The United States Supreme Court, in *Cobert v. New York,* 388 U.S. 443, 87 S. Ct. 2092 reversed a judgment of conviction in an obscenity prosecution and, based on its decision in *Redrup,* found that the motion picture films "Jane Palmer No. 2", "M. Jordan" and "Jayne Tracy" therein involved were entitled to constitutional protection.

On June 12, 1967, the United States Supreme Court in *Shackman v. California,* 388 U.S. 454, 87 S. Ct. 2107, reversed a judgment of conviction in an obscenity prosecution and, based on its decision in *Redrup,* found that certain "girlie" pictures in coin operated peep shows were entitled to constitutional protection.

The aforesaid Supreme Court decisions, running from *Sunshine Book Co. v. Summerfield* to the June 12, 1967 decision in *Rosenbloom v. Virginia,* involving a variety of nudist magazines and other publications and films visually depicting the nude body, both male and female, with genitalia and pubic hair, including a variety of poses, indicate, that nudist magazines, including the magazines and booklets herein involved, are entitled to the protective guarantees of the First Amendment. Such magazines do not today exceed contemporary community standards, cannot be deemed to appeal to a shameful or morbid interest in sex, and their advocacy of nudism cannot be claimed to be utterly without social importance.

In *Excellent Publications, Inc. v. United States,* 309 F. 2d 362 (1 Cir. 1962), the Court of Appeals held that:

> "from view group photographs of naked men, women and children with exposure of the genital areas of both sexes are not obscene as a matter of law", and that "nudity is not necessarily obscenity, as the courts have frequently had occasion to point out. The pictures of nude and near nude women are titillating and provocative. But so also are some of the greatest works of pictorial art. The pictures in 'The Gent' are no more provocative than those on the covers of many pocket books generally on display in drug stores, newsstands, book stores and like establishments" (309 F. 2d at 364-365).

See also, *Humor Magazine Inc. v. United States,* 311 F. 2d 576 (1 Cir. 1963).

In *United States v. Linetsky,* D.C. Kansas, No. T-CR-582, and in *United States v. Wasserman, et al.,* D.C. Kansas, No. T-CR-5811 (Both decided on June 29, 1965), unreported, the Honorable George Templer, a Judge of the United States District Court, held that the following material was entitled to constitutional protection: the magazine "Adam 802 [820]" phonograph records entitled "Erotica, the Rhythms of Love", "The Erotic Delights of Lady C", "Sex Is My Business", and "Bert Henry at the Hungry Thigh", and motion pictures entitled "Carolyn Rossmore", "Donna Scott", "Dee Milo", "Virginia Rogers", "Susan Crane", "Honey Bee", "Nancy Litt", "Timi Shawn", "Lupe Velez" and "Sue Young".

In *Royal News Co. etc. v. Schultz, et al.,* D.C. Mich. S.D. Civil No. 23094, unreported, Chief Judge Theodore Levin found the following nudist magazines to be not obscene and entitled to constitutional protection: "Sunny Holidays at Keutschack Lake"; "Helios" August 1962; "Helios, July 1962"; "Helios, September 1962"; "The Naturist Life, November, 1962"; "Helios, August 1962, Vol. 10"; "The Naturist Life, Vol. 4, No. 7"; "Nude Living, No. 10"; "Suntrials, Vol. 1, No. 1"; "Nude Life, Vol. 1, No. 1"; "Nudist Photo Field Trip", No. 2; "Sun Era, Vol. 1, No. 2"; "Urban Nudist, Vol. 1, No. 1"; "Nude World"; "International Nudistour Guide", Vol. 1, No. 1.

In *Elysium, Inc. v. Oleson,* D.C. Calif. C.D. Civ. No. 63-358-PH, unreported, it was stipulated on May 10, 1962 by the Government that the nudist magazines entitled "Nude Living" and "Sundial" were en-

titled to be mailed as second-class matter and are mailed presently as second-class matter.

In *Central Magazine States Ltd. v. United States*, 389 U.S. 50, the Supreme Court reversed convictions of material described by the trial court as follows (*United States v. 392 Copies of Magazines entitled "Exclusive"*, 253 Fed. 485 [1966]):

> "The Material. The so-called 'magazine' Exclusive is really a picture book containing 34 pictures of nude or almost nude women. In each picture the breasts and pubic area are fully exposed. In some of the pictures the women are wearing garter belts and silk stockings which focus attention on the pubic area. In some of the pictures the models are posed in lewd attitudes and positions. In several pictures the women are chained to a chair and their wrists are bound. The only written material is on the title page, in English and two foreign languages, and appears verbatim in other 'magazines' published by Nordisk Bladcentral, of Copenhagen.
>
> "International Nudist Sun No. 16 and Review International No. 6 each contain 20 posed pictures of well-developed nude men, with the focus in most instances on the penis, which is flagrantly displayed. Although posed in outdoor settings, in few of the pictures are the models engaging in any normal outdoor activities. The articles in both magazines are innocuous, dreary and puerile, and bear little relation to the illustrations. No reference is made to the illustrations in any of the articles."

The Fourth Circuit Court of Appeals further characterized and described the materials involved in affirming the trial court's decision. *United States v. 392 Copies of Magazine entitled Exclusive*, 372 F. 2d 633 (1967) as follows:

> "Review International and International Nudist Sun are collections of photographs of undressed males. These two magazines are comparable in all respects to Hellenic Sun Number Two, which we held today in the Potomac News case to be obscene.
>
> "Exclusive is a collection of photographs of young women. In most of them, long stockings and garter belts were employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide."

Notwithstanding all of the foregoing, the Supreme Court of the United States reversed *per curiam* citing *Redrup v. State of New York*, 386 U.S. 767.

In *Potomac News Co. v. United States*, 389 U.S. 47, the Supreme Court reversed a Fourth Circuit Court of Appeals' decision (*United States v. 56 Cartons con-*

taining 19,500 Copies of Magazine entitled "Hellenic Sun", 373 F. 2d 635 (1967) at page 640, which decision from the conviction finding certain materials obscene which the Circuit Court described in the following language:

> "The Magazine 'Helenic Sun Number Two' is a collection of photographs of undressed men. Some are in color. There is one of a group of boys. They are posed in the out-of-doors, but generally languid models are not engaged in outdoor activity. In the composition of the photographs, the genitals of the models are made the focal points of the pictures. The camera's interest is languished upon the penis, and, if the general pose of each model be languid, the penis in some of the pictures appears not in complete repose."

In spite of the above set forth vivid and explicit description of the materials, the Supreme Court simply reversed *per curiam* citing *Redrup*.

It should also be pointed out at this point that this very Court had adopted exactly the same tests as were employed by the above set forth decisions, by reason of this Court's decision in *Culbertson v. State of California*, 385 F. 2d 209 (1967), in which this Court reversed a finding of obscenity utilizing and adopting the "hard core" pornography test in the following language at page 210:

> "We have examined the photographs in question. Each depicts four scantily clad women whose poses might be provocative to some. The pictures are not artistic, but we are thoroughly convinced that they are not hard-core pornog-

> raphy and that they do not, in their expression, go 'substantially beyond customary limits of candor." See Redrup v. State of New York, 386 U.S. 76, 87 S. Ct. 1414, 18 L Ed 2d 515 (1967); Jacobellis v. State of Ohio, 378 U.S. 184, 84 S Ct 1676, 12 L Ed 2d 793 (1964); Roth v. United States, 354 U.S. 476, 77 S Ct 1304, 1 L Ed 2d 1498 (1957). This was the view of the dissenting member of the three-judge California appellate court which affirmed the state court conviction, and we agree with it."

It is the position of the appellants in this case that nudity, no matter how vulgar or displayed, where it is nothing more than nudity with the exhibition of the female vagina, does not constitute obscenity even though that exhibition may be gross. Cases in California dealing expressly with that point are the cases of *People v. Noroff*, 67 Cal. 2d 791, and *In re Panchot*, 70 Cal. 2d 105. In each of these cases, the gross depiction of nude females posed in such a manner as to vividly and graphically depict the vaginal area was held not to be obscene.

Perhaps, the most recent case on this point was decided by the United States Supreme Court in a case entitled *Burgin v. South Carolina*, 40 U.S. Law Week 3160 (U.S. S. Ct. 70-122, October 12, 1971) wherein, the Supreme Court of the United States reversed an obscenity finding arising out of the State of South Carolina in holding not obscene on the basis of *Redrup, supra*, the materials involved which were a book called "Mirage" and magazines entitled "Togetherness", "Fair Lady" and "Flesh and Fantasy". Here is a description of the material given by Justice Littlejohn of

the Supreme Court of South Carolina in 178 S.E. 2d 325:

> "I find the Book 'Mirage' is a book containing color photographs of completely nude and/or semi-nude females. The semi-nudes only being that of females wearing garter belts, hose or other transparent materials. That the nudes are posed in such positions with legs wide spread that the pubic hair and external part of the genital organs are clearly visible. They are posed in positions sitting, lying, forward, backwards, leaning backwards, standing on their heads, all positions so that the camera would be focused directly upon the genital organs and breasts of the nudes.
>
> "In the magazine 'Togetherness' I find there are colored photographs of male and female nudes, or semi-nudes. The semi-nudes having only garter belts, hose, and in some instances the males having on trousers with the front portion of the trousers cut out or removed therefrom. Also, in poses directed so that the camera could focus on the genital organs of the males and females in positions with the males and females emphasizing the pubic and rectal regions of the males and females.
>
> "In the magazine 'Fair Lady' also portrays similar color photographs of nude females in similar positions.
>
> "In the magazine 'Flesh Fantasy' is black and white, and color photographs of females with legs outstretched, completely nude, with females with clothes on undressing each piece of clothing in successive pictures, with the camera focused or ultimately focused completely upon the genital organs of the females."

Comparison of the materials, pictures, films, etc. held not obscene in the afore-mentioned cases makes crystal clear that the conduct involved herein is not obscene as a matter of law. The conduct in the instant case, which portrays nudity, is no different than the pictures held constitutionally protected in the above-mentioned cases.

Wiener v. California, ... S. St. ...., 71-443, Dec. 14, 1971, ... U.S. ..... .

IV.

California Penal Code Section 311.6 and Section 311(a)(g) Is Unconstitutionally Vague, Ambiguous and Unintelligible.

Petitioners herein assert that Penal Code Sections 311.6, 311(a) and 311(g) are unconstitutionally vague, ambiguous and are indeed unintelligible.

Petitioners are not unmindful of this Court's decision in *Roth v. United States,* 374 U.S. 476, 77 S. Ct. 1304 (1957). Nevertheless, it is felt that a simple reading of the definition of "obscene matter" contained in California Penal Code Section 311(a) renders the entire insoluble complexity clearly apparent and cries out to this Court to re-think its decision and attempt to clarify the entire area.

Under the definition, what is a prurient interest? What is shameful? What is morbid? Who is the average person? How do we determine what appeals to the average person? What are the limits of candor? What exactly are contemporary standards and how do we determine them? If we determine contemporary standard, how do we know with any amount of exactitude where the line is drawn at any particular time in view of the fact that standards have changed and are chang-

ing continuously? What does "utterly without redeeming social value" mean? If "utterly" really means "utterly", is there any graphic material or printed material that can ever be considered "utterly" without value? If materials have value for some small segment of the population, is that sufficient to render them legal?

All of these questions are, of course, asked rhetorically. Nevertheless, it stretches credulity to the breaking point to think that such a statute with such a definition imparts any notice whatever to the average lay citizen.

Even the most learned judges and the most experienced attorneys in the field have great difficulty in dealing with the problem of determining what materials actually are or are not legally proscribable. If the most learned judges and the most experienced attorneys have difficulties, how is it that the average lay person is expected to be able to abide by the kind of "notice" given him under this extremely difficult statute? To ask the question, is to answer it.

No one really knows what the definition actually means. And no one knows exactly to what materials the statute applies.

This writer has heard various arguments to the effect that if a person wishes to avoid the problems that are involved in the definition of obscenity, all he need do is refrain from selling material that might come within the purvue of the statute. This is, of course, to beg the question. If persons must draw artificial lines themselves to avoid the questions of the possible application of an obscenity statute, then we are encouraging self-censorship on the part of our citizens. The First Amendment abhors the requirement of self-cen-

sorship as much as it abhors the application of government censorship, *Mishkin v. State of New York, supra,* at page 511.

V.

California Penal Code Section 311.6 Is Violative of the Fourteenth Amendment of the United States Constitution Because It Denies to Petitioners the Equal Protection of the Laws.

In the instant case the defendant Behr was the bartender and manager of the establishment in which North and Stevens performed. There was no evidence that he had a financial interest in the establishment other than working for wages.

Section 311.2(b) exempts projectionists and operators of motion pictures that are obscene where they have no financial interest in the establishment other than wages. It seems apparent to this petitioner that by not granting similar exempt statuts to all non-performing persons who manage or operate the establishment with no financial interest other than wages would violate the petitioner Behr's constitutional rights under the Fourteenth Amendment equal protection clause.

Conclusion.

It is respectfully submitted that for all of the foregoing reasons contained herein the petition for Writ of Certiorari should be granted.

Respectfully submitted,

BURTON C. JACOBSON,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 1341

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Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioners were convicted of a violation of Section 311.6 of the Penal Code of the State of California, which provides as follows:

> Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or

before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor.

Petitioners waived trial by jury and were tried by the court. Following imposition of sentence an appeal was taken to the Appellate Department of the Superior Court of the State of California, which court is the court of last resort in the State of California for misdemeanor violations. The Appellate Department of the Superior Court of the State of California affirmed the judgment without opinion. Petitioners neither petitioned the Appellate Department of the Superior Court of the State of California for a rehearing nor certification to the District Court of Appeals of the State

of California. Either of said petitions, if granted, would have resulted in further review on the state level.

STATEMENT OF THE EVIDENCE

On July 23, 1971, at 10:00 p.m., Los Angeles Police Office Joseph Stanley went to the All American Girl Bar at 5901 Melrose in the City of Los Angeles (R.T. p. 9, line 9). When Stanley entered, he observed appellant Behr behind the bar. Behr was giving change to a customer who had a glass of beer. Behr was hollering at customers to "kick into" the girl so she would dance and also to spend a little money on the juke box. Appellants North and Stevens were wearing only bikini bottoms (R.T. p. 12, lines 1-28). Behr also was operating a movie projector (R.T. p. 14, lines 9-11).

North went up on the stage and danced to music from the juke box (R.T. p. 15, line 9). Behr, behind the bar, was hollering in a loud voice "Somebody give [North] a dollar and she'll do her thing for you. Give Corky a dollar and she'll do her special dance for you." (R.T. p. 16, lines 4-10).

North then removed her bikini bottoms and was nude (R.T. p. 16, lines 12-14). A male put a dollar bill in front of North (R.T. p. 17, lines 2-5). North smiled, clapped her hands and shouted "all right" as she was looking at the male. She moved the dollar aside and went down on her back, raising her knees up and exposing her vaginal area directly to the male (R.T. p. 18, line 22 to p. 19, line 6).

North began to move the lower part of her body, especially the vaginal area, towards the customer and back in a rotation-type method (R.T. p. 19, lines 13-17).

After 30 to 45 seconds she raised her left leg straight up. Her right leg was off at an angle. This position exposed her vagina directly to the male who gave her the dollar (R.T. p. 20, lines 16-28). The only part of her body that was moving was her vagina. The male was three to four feet from North looking directly at her vagina (R.T. p. 21, lines 1-15).

North then went into a squat position. Her legs and vagina were spread apart. She began an in and out motion with the lower

portion of her body directing it at the customer (R.T. p. 22, lines 1-4). The lips of her vagina were moving in and out (R.T. p. 24, lines 18-21).

Appellant Stevens was on the stage nude. A male put a dollar into a pitcher. Stevens pushed the pitcher aside and got into a squat position in front of the male with her vagina exposed. Stevens stared directly at the male and began to move the lower part of her body in and out (R.T. p. 26, lines 23-25). Stevens was one and a half feet away from the male with the lips of her vagina spread apart (R.T. p. 27, lines 5-9).

Stevens was squatted over a spotlight. The male turned the spotlight on the vagina (R.T. p. 27, lines 16-22). Stevens stayed in the "spotlight area" for 30 seconds, continuing an in and out motion with the lower part of her body and vagina. She stepped back and waving her hand in front of her vagina stated "Boy, it's hot down there." (R.T. p. 28, lines 12-18).

Stevens got into a second squat position. She spread her legs exposing her vagina. She placed her fingers on each side of the

vagina. She spread her vagina apart. She moved the lower part of her hips (R.T. p. 29, lines 11-21).

During the above, appellant Behr was seating patrons, checking identifications, encouraging patrons to drink so they could go home drunk to the old lady, encouraging patrons to "tip" in order to get a special performance and encouraging patrons to chip into the juke box (R.T. p. 30, lines 21-22).

Behr was also telling patrons not to worry as the films would be back on. He stated that "I have the best hard-core in L.A. The only people that have any better is L.A.P.D. and they get theirs from me." (R.T. p. 31, lines 20-22).

Henry J. Petroski testified as an expert regarding contemporary community standards and appeal to prurient interest. He had conducted extensive interviews throughout California to determine what the average person felt goes substantially beyond customary limits of candor (R.T. p. 63, lines 21-25). The interviews were conducted in 36 counties and 95 cities in California (R.T. p. 64, lines 2-3).

In Petroski's opinion, the performances of North and Stevens were substantially beyond the customary limits of candor and the predominant appeal of the performances is to a prurient interest in sex and nudity (R.T. p. 83, lines 12-16).

The court determined that the conduct was not a dance. It was a display and manipulation of the genitalia with movements simulating sexual intercourse for the sole purpose of appealing to prurient interests of the audience. The court determined that the conduct went beyond customary limits of candor in the statewide community and it had no social redeeming value (R.T. p. 130, lines 6-13).

The court found sufficient evidence that appellant Behr participated as a principal, and aided and abetted North and Stevens. The court specifically found that Behr comes within the purview of Penal Code Section 311.6 (R.T. p. 130, lines 14-18).

I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE NO SUBSTANTIAL QUESTION OF FREE EXPRESSION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IS PRESENTED

Petitioners' reliance on Roth v. United States, 354 U.S. 476, and Jacobellis v. Ohio, 378 U.S. 184, is misplaced, inasmuch as it assumes that the vulgar display of a female's private parts, under a spotlight, for money, is some form of speech or expression. The facts in this case clearly demonstrate that Petitioners were not engaging in any form of speech.

The performance of a dance, like other forms of expression or communication, prima facie enjoys protection, in California, under the First Amendment of the Constitution of the United States. In re Giannini, 69 Cal.2d 563, 567. However, mere nudity in a public place is not entitled, in California, to the prima facie protection of the First Amendment of the United States Constitution unless embodied in a play or dance. Barrows v. Municipal Court, 1 Cal.

3d 821, In re Giannini, 69 Cal.2d 563, see also, Justice Douglas' dissent in Roth v. United States, 354 U.S. 476, 512. Respondent submits that the conduct of Petitioners was not dancing or any other form of expression or communication.

II

THE CONDUCT INVOLVED IN THE WITHIN CASE IS OBSCENE AND IS NOT CONSTITUTIONALLY PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioners' argument that the conduct in this case is not obscene, and is protected by the First Amendment of the United States Constitution, assumes that said conduct was some form of expression or communication, although it remains unarticulated just how this conclusion is reached. Assuming, arguendo, that their conduct is prima facie protected, the evidence presented demonstrated that it was obscene.

The California definitions regarding obscenity follow the rulings of the United States Supreme Court. "Obscene Live Conduct" is defined as follows:

"Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant

sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

California Penal Code
Section 311(g)

Penal Code Section 311.6 was enacted as a result of Barrows v. Municipal Court (1970) 1 Cal.3d 821, which held that Penal Code Section 647(a) [Lewd Conduct] was not a proper vehicle for the prosecution of obscenity occurring in a play, and In re Giannini (1968) 69 Cal.2d 563, which held that a nude dancer, in order to be convicted of violating Penal Code Section 314.1

[Indecent Exposure] must be prosecuted under "obscenity" standards. Petitioners should not be heard to complain that they should have been prosecuted under less restrictive statutes, and, in any event, the People still would have had the burden imposed by In re Giannini, supra. Merely because the People prosecuted Petitioners under Section 311.6 does not mean that the People thereby conceded that Petitioners' conduct was prima facie protected any more than it necessarily means that the People were desirous of affording Petitioners the greatest amount of protection under the law.

All of the cases cited by Petitioners involved subject matter which had in some way been memorialized, either on film or in print, prior to its exhibition. The subject matter of the present case involves obscene live conduct. Nevertheless, there is no reason why live conduct cannot be readily judged by the same standards, keeping in mind that live conduct, with the extremely close customer contact shown in this case, can vary from performance to performance, can result in much more

serious law enforcement problems, and would seemingly have a greater impact on the public exposed to it.

The essence of Petitioners' argument as to nonobscenity of their conduct is that mere nudity, absent graphic depiction of sexual activity, cannot be held obscene; that only "hard core pornography" can be considered legally obscene. Although this is somewhat of a simplification of the rationale of recent Supreme Court cases, Respondent submits that in cases of obscene live conduct, the circumstances of production, presentation and exhibition are more significant than in cases dealing with books, magazines and films. The actions and statements of petitioners, in the setting in which they occurred, speak for themselves as to the obscenity, and refute any contention of expression or communication.

In any event, Petitioners' theory cannot help them under the facts in this case: for the price of a dollar, Petitioners North and Stevens would squat and lie down, one to four feet from their customers, who could then turn a spotlight on Petitioners'

exposed private parts. Petitioners would spread their legs, spread their vaginas apart with their hands, and manipulate their genitalia with movements simulating sexual intercourse, all to the enthusiastic supervision and soliciting of Petitioner Behr.

Somewhat superfluously, the People produced expert testimony, which was uncontradicted by Petitioners, that the conduct went substantially beyond customary limits of candor and that the predominant appeal of the performances was to a prurient interest in sex and nudity.

Respondent submits that Petitioners' attempt to equate their performances with nudist and "girlie" magazines held not obscene is weak and unconvincing; instead, in this situation Petitioners' conduct was clearly obscene.

III

CALIFORNIA PENAL CODE SECTIONS 311.6 AND 311(g) ARE NOT UNCONSTITUTIONALLY VAGUE, AMBIGUOUS AND UNINTELLIGIBLE

It should be noted that Petitioners attack in this regard is also directed at California Penal Code Section 311(a) [Definition of "Obscene Matter"], yet this statute is not involved herein; it is applicable only in prosecutions under California Penal Code Section 311.2 [Sale or Distribution, etc., of Obscene Matter]. For this reason, Respondent will not discuss Section 311(a) herein.

Petitioners also say nothing in support of their contention that Section 311.6 is vague, ambiguous and unintelligible, and it does not appear so to Respondent. Rather, Petitioners limit themselves to an attack on Section 311(g), which is California's legislative enactment of the rule of Roth v. United States, 374 U.S. 476.

Petitioners, while "not unmindful" of the court's decision in Roth v. United States, implicitly recognize that Section

311(g) is not vague, ambiguous or unintelligible. Rather, Petitioners complain that they experience great difficulty in dealing with the court's opinion. Respondent submits that such does not render the court's opinion vague, ambiguous, or unintelligible; there are other, more obvious reasons, for Petitioners' difficulty.

It is unlikely that any opinion of any court, dealing with First Amendment problems, will ever answer all the questions in all the future cases; rather, First Amendment cases should raise difficult questions, and should require the utmost thought and careful consideration from judges and lawyers.

IV

CALIFORNIA PENAL CODE SECTION 311.6 IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DOES NOT DENY PETITIONER BEHR THE EQUAL PROTECTION OF THE LAWS

Petitioner Behr argues that since California Penal Code Section 311.2(b) provides

that a motion picture operator or projectionist employed by a person licensed by the City, who is acting within the scope of his employment, cannot be convicted of exhibiting obscene matter, an analogous provision should exist for a manager of a public place wherein obscene live conduct is presented.

Section 311.2(b) has been construed to exempt only a bona fide projectionist whose activities are limited strictly to operation of a movie projector. By performing other functions, such as supervising the operation of business, collecting admissions, etc., a "projectionist" loses the exemption. People v. Stout, 18 Cal.App.3d 172.

Even if a similar exemption existed under Section 311.6, Petitioner Behr would not benefit, since the evidence showed he was the manager; he seated patrons, checked identifications, encouraged patrons to drink, and solicited patrons to pay Petitioners North and Stevens a dollar in order that they might obtain a personal exhibition of the obscene live conduct.

Petitioner cites no case and offers no

theory in support of his proposition. Section 311.2(b) is obviously intended to relieve bona fide projectionists, who are invariably union craftsmen with no particular interest in what is being projected, from becoming the censors for the movie industry, an area obviously outside their competence. In every prosecution of a person under Section 311.2 or 311.6, the People must show the requisite degree of scienter and criminal intent; Respondent submits that such was amply demonstrated as to Petitioner Behr. If the degree of involvement of Petitioner Behr had merely been to an extent similar to a bona fide projectionist under Section 311.2(b); that is, if he had merely checked identifications and shown patrons to their seats, for example, he obviously couldn't have been successfully prosecuted. Section 311.6 specifically applies only to those who actually engage or participate in, or who manage, produce, sponsor, present or exhibit obscene live conduct. Therefore, one must be directly involved.

V

THE SUPREME COURT OF THE UNITED STATES SHOULD NOT TAKE JURISDICTION TO REVIEW A JUDGMENT WHERE NO OPINION WAS DELIVERED BY THE HIGHEST STATE COURT

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said appellate court therefore did not in any way pass upon any federal questions.

The appellate jurisdiction of the United States Supreme Court over a state court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court. Cincinnati, N.O. & T.P.R. Co. v. Slade, 216 U.S. 78.

Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Steinbridge v. State of Georgia, 343 U.S. 541.

CONCLUSION

The questions raised here appear to be most similar to those presented to this Court in No. 71-1282, Gianone v. California, Petition for Writ of Certiorari denied May 22, 1972 (40 L.W. 3556).

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioners' rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or decided a federal question of substance not heretofore determined by this Court.

There appears in this case no reason, either in law or in good conscience, why the petition should be heard or granted without first having the highest court of the State of California express its opinion on the questions here raised. The matter should be dismissed.

Respectfully submitted,

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